Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers	)))))))	WC Docket No. 03-251

COMMENTS OF AMERICATEL CORPORATION

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I. Introduction & Summary

Americatel Corporation ("Americatel"),[1] through counsel, respectfully submits its comments in response to the Petition filed by BellSouth Telecommunications, Inc. ("BellSouth") on December 9, 2003,[2] which the Federal Communications Commission ("FCC" or "Commission") placed on public notice on December 16, 2003.[3]

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1 Americatel, a Delaware corporation that is a subsidiary of ENTEL Chile, is a common carrier providing domestic and international telecommunications services. ENTEL Chile is the largest provider of long distance services in Chile and also provides wireless and competitive local services in the Chilean market. Americatel also operates as an Internet Service Provider ("ISP"). Americatel specializes in serving Hispanic communities throughout the United States, offering presubscribed (1+), dial-around, and prepaid long distance services, as well as private line and other high-speed services to its business customers. The majority of traffic carried by Americatel is dial-around in nature.

2 BellSouth Emergency Request for Declaratory Ruling, filed December 9, 2003 ("*BellSouth Petition*").

3 Public Notice, *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers*, DA 03-3991 (rel. Dec. 16, 2003) ("*Public Notice*"). The Commission later extended the due dates for comments and reply comments at the request of the National Association of Regulatory Utility Commissioners ("NARUC*"). BellSouth Telecommunications, Inc. Request for Declaratory*

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BellSouth seeks a declaratory ruling from the Commission that would preempt several state public utility commissions ("PUCs") from directing BellSouth to provide either BellSouth's "wholesale broadband transmission or its retail Internet access service over UNE [unbundled network element] loops leased by CLECs [competitive local exchange carriers] (either on a stand-alone basis or as part of the UNE platform ('UNE-P')."[4]

BellSouth argues that these PUC actions violate the Commission's *Triennial Review Order*[5] and are also inconsistent with the Commission's national framework for ensuring the continued "vibrant and competitive" market for the Internet.[6] BellSouth's arguments are fallacious and, accordingly, its petition should be dismissed. The Commission's decisions to prohibit PUCs from adding to the national list of UNEs and to bar the states from requiring ILECs to provide DSL service to CLEC customers are clearly unlawful. In making these decisions on whether to reverse existing Commission rules, the FCC failed either to follow its

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Ruling that State Commissions May not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers, Order, WC Docket No. 03-251, DA 03-4111 (rel. Dec. 30, 2003).

[4] *BellSouth Petition*, at 2 (internal footnote omitted).

[5] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report & Order, Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *petitions for mandamus and review pending United States Telecom Ass'n v. FCC*, Nos. 00-0012, 00-1015, 03-1310 *et al.* (D.C. Cir.).

[6] *BellSouth Petition*, at 2. BellSouth also claims that the PUCs' policies, if left unchecked, would diminish investments in broadband networks by both incumbent local exchange carriers ("ILECs") and CLECs alike. *Id.*, at 3.

existing precedents or to provide, as required by law, a complete explanation for its position reversal.

Moreover, the FCC's denial of regulatory authority to the states with respect to additions to the UNE list (effectively setting a ceiling on the list of UNEs) and the mandatory provision of the BOCs' DSL services to CLEC customers is completely inconsistent with the FCC's decision to delegate to the very same states more regulatory authority to reduce the number of UNEs that must be offered from those registered on the national list. Additionally, the Commission erred in basing its decision to limit PUC authority in these two areas on the very same findings that it used previously to reach the opposite conclusions. The *Triennial Review Order*, upon which BellSouth's request for relief is premised, also ignores BellSouth's obligations under Section 201(a) of the Communications Act of 1934, as amended ("Act"), to provide service to customers upon reasonable request.[7]

The Commission's preemption of the states in the *Triennial Review Order* was also unlawful because there had been no showing that PUC action in these same areas improperly interfered with the FCC's regulations. The FCC may not constitutionally preempt the states merely to advance its policies, but must actually find a clear conflict with an established federal policy before the FCC can preempt a state. Also, the Commission's blanket preemption in the *Triennial Review Order* flies in the face of principles of federal-state comity and is contrary to FCC precedent. Normally, the Commission has only preempted the PUCs on a case-by-case basis and then, only where a compelling showing of conflict with federal policy has

[7] 47 U.S.C. §201(a).

been made. Those circumstances simply do not exist in connection with the *Triennial Review Order*.

In view of these problems with the *Triennial Review Order*, the validity of which necessarily underpins BellSouth's request, the Commission should not compound its previous error by granting further relief to BellSouth. Rather, the Commission should simply dismiss the *BellSouth Petition*. In the alternative, the FCC should hold the *BellSouth Petition* in abeyance, pending final resolution of the petitions for reconsideration and for judicial review.

II. The Commission's Decisions to Prohibit PUCs from Adding to the List of UNEs and from Requiring ILECs to Provide DSL Service to CLEC Customers Are Clearly Unlawful

A. The List of UNEs

When the Commission first adopted its rules for UNEs, it refused to develop an exhaustive list of UNEs to which the states could not add.[8] The FCC, instead, established a base list of UNEs to which PUCs could add when appropriate showings were made. The Commission made that decision based on its determination that "such a[n exclusive] list would not necessarily accommodate changes in technology and would not provide states with the flexibility they need

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[8] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* and *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, at ¶243 (1996) ("*Local Competition Order*"), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded*, *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) ("*Iowa Utils. Bd.*"), *on remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *reversed in part sub nom*. Verizon Communications Inc. v. FCC, 535 U.S. 467 (2002) ("*Verizon*"), Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997) (subsequent history omitted).

to deal with local conditions."[9] These findings and the resulting policy decision were not reversed on appeal or in any of the Commission's subsequent reconsiderations of the *Local Competition Order;* yet, the FCC still did "a 180" in the *Triennial Review Order*, when it decided that the states could no longer add to the list of UNEs.

Without engaging in any substantial analysis to justify its regulatory countermarch, the FCC abruptly changed its position on the authority of states to add to the Commission's list of UNEs in the *Triennial Review Order*.[10] The Commission simply waved its preemptive sword in an aggressive manner and declared that it disagreed with those who argued that, because the FCC had "permitted states to add UNEs to [the FCC's] national list in the past," the it did not have the authority to reverse that position and to prevent PUCs from adding more UNEs.[11]

In making its decision to strip PUCs of authority to supplement the national UNE list, the Commission never addressed its prior determination that a single national UNE list "would not necessarily accommodate changes in technology and would not provide states with the flexibility they need to deal with local conditions."[12] Instead, the Commission merely recited the requirements of Section 251(d)(3) that permit states to set forth state unbundling requirements that are "consistent with the requirements of Section 251 *and* do not 'substantially

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9 *Id.*

10 *Triennial Review Order,* at ¶¶187, *et seq.*

11 *Id.*, at ¶193.

12 *Local Competition Order*, at ¶243.

prevent' the implementation of the federal regulatory regime," as if that constituted a reasoned analysis for the Commission's radical policy reversal.[13]

A dooming flaw in the FCC's "analysis" is the fact that Section 251(d)(3) read exactly the same in 1996 when the Commission determined that the PUCs could lawfully add to the list of UNEs, as it did in 2003 when the Commission adopted the exact opposite rule. As the FCC recognized in 2003, "[m]any states have exercised their authority under state law to add network elements to the national list."[14] Based on the Commission's original findings (which have never been changed), those state actions adding UNEs were lawful and presumably necessary to accommodate changes in technology and to meet the needs of local markets. The *Triennial Review Order*, upon which BellSouth rests its upward deviation is to be permitted, can accommodate changes in technology and the needs of state PUCs to address their local markets.

Needless to say, the Commission—or any other federal agency, for that matter—is free to change its rules or policies. However, the courts have clearly stated that an agency may not change or rescind a rule or depart from its precedent without first supplying a "reasoned analysis for the change."[15] Moreover, in order to defend its rule against a claim that it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," an

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13 *Triennial Review Order*, at ¶193 (footnote omitted, emphasis in original).

14 *Id.*, at ¶191 (footnote omitted).

15 *Global Crossing Telecommunications, Inc. v. FCC*, 259 F.3d 740, 746 (D.C. Cir. 2001), *quoting from Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mutual Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). *See also, Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) and *Mountain Communications, Inc. v. FCC*, No. 02-1255, *slip op.* (D.C. Cir. January 16, 2004).

agency must "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choices made.' "[16]

The Commission simply failed to satisfy these fundamental requirements when it changed its rule on the authority of states to supplement the Commission's list of UNEs. The Commission left in place its prior factual findings used to justify its original rule permitting PUCs to opt for additional UNEs, while the FCC adopted the exact opposite rule. This is simply not consistent with fundamental principles of administrative law.

The new ban on additional PUC-created UNEs is even more indefensible when one considers that, in the very same general section of the *Triennial Review Order* in which the FCC stripped the states of authority to supplement the national list of UNEs, the Commission delegated substantial additional authority to the PUCs to examine local market conditions to determine whether the national list of UNEs should be contracted.[17] The Commission concluded that this additional delegation of authority to the states constituted reasonable implementation of the statute, "particularly given that states may be in the best position to judge whether the Act's extraordinary unbundling remedies should be applied."[18]

Americatel does not contest herein the appropriateness of the FCC's decision to permit PUCs, upon proper factual showing, to contract the national list of UNEs. It seems that this authority is consistent with the Commission's 1996 finding that the states needed flexibility on UNE designation matters to accommodate changes in technology and local market conditions.

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[16] *State Farm*, 463 U.S. at 43.

[17] *Triennial Review Order*, at ¶¶187 *et seq.*

[18] *Id.*, at ¶188.

However, the idea that PUC authority over UNEs is a now a one-way street is simply incredible and, thus, unsustainable in court. Essentially, the Commission has determined that: 1) technology may change in unforeseeable ways such that CLECs might well need access to fewer UNEs than each one currently enrolled on the national list, but will never need access to more; and 2) local markets conditions (which are generally to be ascertained by the PUCs) may change in ways such that CLECs might well need access to fewer UNEs than each one currently enrolled on the national list, but will never need access to more. This position is unsustainable and renders void the *Triennial Review Order* insofar as it addresses PUC authority to add to the national list of UNEs.

B. The PUCs' Requirements to Provide DSL to CLEC Customers Based on Local Market Conditions

BellSouth also complains that several PUCs have required BellSouth to provide wholesale broadband transmission or its retail Internet access service over UNE loops leased by CLECs (either on a stand-alone basis or as part of the UNE platform ('UNE-P')."[19] The Commission provided an impetus for consumers to purchase DSL and voice services from different vendors when it authorized line sharing in 1999.[20]

As Congress and the Commission predicted, technological and market changes continued after passage of the 96 Act. One such post-1996 change was the market rollout of commercial DSL services to residential and small business customers by both ILECs and

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19 *BellSouth Petition*, at 2 (internal footnote omitted).

20 *Deployment of Wireline Services Offering Advanced Telecommunications Capability* and *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report & Order in CC Docket No. 98-147 and Fourth Report & Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*").

CLECs. As all are well aware, DSL technology permits consumers to operate their local telephone line for voice and high-speed data service simultaneously by using the high frequency portion of the local loop ("HFLP") for data transmission and the lower frequency portion of the very same loop for Plain Old Telephone Service ("POTS").[21] Prior to the FCC's adoption of the new line-sharing policy, a consumer who desired to purchase DSL and POTS from different carriers was required to purchase a second local line (or the DSL carrier would need to obtain an separate line) from the ILEC.

In the *Line-Sharing Order*, the FCC adopted a "requirement that incumbent LECs unbundle the high frequency portion of the loop to permit competitive LECs to provide xDSL-based services by sharing lines with the incumbent's voiceband services."[22] That same order continued as follows:

> We find that unbundling this network element is technically feasible, presents no substantial operational issues, is legally justified, and serves the public interest. We also find that line sharing promises to bring broadband access to residential and small business consumers, and conclude that incumbents should be able to provide line sharing within 180 days of release of this Order. Our decisions herein should ensure that residential and small business consumers receive the benefits of competition and innovation promised in the Act.[23]

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21 *See generally, id.*, at ¶¶7-9.

22 *Id.*, at ¶13 (footnote omitted).

23 *Id.* (footnote omitted).

The FCC concluded that the high frequency portion of the local loop met the definition of a UNE and that it was technically feasible for ILECs to provide CLECs with access to the high frequency portion of the local loop as a UNE.[24] The Commission also found:

> An incumbent LEC's failure to provide access impairs the ability of a competitive LEC to offer, on a competitive basis, certain forms of xDSL-based service that are capable of line sharing with voice services. The record shows that lack of access to the high frequency portion of the local loop would materially raise competitive LECs' cost of providing xDSL-based service to residential and small business users, delaying broad facilities-based market entry, and materially limiting the scope and quality of competitors' service offerings.[25]

Finally, the Commission determined that:

> [A]ccess to the high frequency portion of the loop encourages the deployment of advanced telecommunications capability to all Americans as mandated by section 706 of the 1996 Act. Because some residential and small business markets may lack the economic characteristics that would support competitive entry in the absence of access to the high frequency spectrum of a local loop, it is clear that spectrum unbundling is crucial for the deployment of broadband services to the mass consumer market.[26]

The Commission's line-sharing rule was subsequently vacated by the D.C. Circuit in *United States Telecom Ass'n v. FCC.*[27] The court held that the Commission failed to provide adequate consideration of the competitive alternatives to ILEC-provided DSL services

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[24] *Id.*, at ¶25.

[25] *Id.*

[26] *Id.*

[27] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

(especially cable modem service) and, thus, the FCC had failed to provide a rational limiting standard to the unbundling requirements for ILECs, as required by the *Iowa Utils. Bd.* case.[28]

On remand, the Commission went from one extreme to another. In its initial decision that permitted line sharing, the Commission concluded that CLECs "were impaired without unbundled access to the HFPL because, among other things, purchasing a stand-alone loop would be too costly for carriers seeking to offer only broadband service."[29] The Commission also found in the same decision that there was no general sharing of local loops between CLECs.[30]

In its remand decision, the Commission reversed its conclusion on impairment because it found that CLECs could now afford to purchase an entire UNE loop to provide DSL service because CLECs can obtain other revenues (*e.g.,* voice over Internet protocol ("VOIP"), video and data) from the stand-alone loop.[31] (The FCC also found that CLECs were now sharing UNE loops.[32])

Americatel submits that the finding on the cost-effectiveness of CLECs' purchase of a separate UNE loop to provide stand-alone DSL service may well be invalidated by the Commission's ongoing reevaluation of its TELRIC rules for pricing UNEs.[33] In that

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28 *Id*., 290 F.3d at 295, *citing Iowa Utils. Bd.*, 525 U.S. at 388.

29 *Triennial Review Order*, at ¶257, *citing Line Sharing Order*, at ¶¶39-43.

30 *Line Sharing Order*, at ¶48.

31 *Triennial Review Order,* at ¶258.

32 *Id*., at ¶258.

33 *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, WC Docket No. 03-173, FCC 03-224 (rel. Sept. 15, 2003).

proceeding, the BOCs are seeking rule changes that, if adopted by the FCC, would likely result in increased prices for UNE loops. Since the FCC's "non-impairment" conclusion was premised on UNE loop prices that were based on the existing TELRIC rules, should those rules be changed and, as a result, UNE loop prices increase, the Commission's "non-impairment" finding would also need to be reconsidered.

Also, in response to the court order in the *United States Telecom Ass'n* case, the Commission reasoned that, due to the availability of other broadband technology in the mass market, "any concern that competition in the broadband market may be heavily dependent upon unbundled access to the HFPL" has largely been alleviated.[34] However, Americatel submits that the availability of cable modem service to consumers is immaterial to CLECs that want to market packages of services to consumers,[35] unless the FCC were also to require cable TV operators to offer their cable modem service on a resale or unbundled basis.[36]

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34 *Triennial Review Order*, at ¶263.

35 While Americatel strongly supports regulatory policies that do not foreclose a la carte competition in favor of competition only in bundled service packages, Americatel, nonetheless, recognizes that there is an appropriate place in the market for service bundles.

36 The Commission has determined that "cable modem service, as it is currently offered, is properly classified as an interstate information service, not as a cable service, and that there is no separate offering of telecommunications service." *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling,* and *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Order and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4802 (2002). As a non-telecommunications service, cable modem service would not be subject to any of the unbundling and resale requirements of Section 251 of the Act. However, the Commission's declaratory ruling has been reversed in part by the courts. *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003). The Ninth Circuit affirmed the Commission's determination that cable modem service was not a cable service, but vacated the FCC's conclusion that it was not a telecommunications service. To the extent that this ruling stands, it could mean that cable TV operators would be required to offer cable modem services to CLECs for resale. Moreover, Americatel would expect that the FCC would also be asked to require cable modem service be offered on an unbundled basis in order to stimulate more competition in broadband services.

Moreover, the Commission's earlier decision to permit ILECs to refuse to provide DSL services to CLEC voice customers flies in the face of the Section 201(a) requirement for carriers to provide service upon a reasonable request therefor. Despite the desires of the BOCs in this instance, the 96 Act does not eliminate the applicability to the BOCs of other sections of the Act itself or any other state or federal law, including the common law as it relates to carriers. Congress made that explicit in Section 261(c) of the Act.[37] That section reads as follows: "Federal, State, and Local Law. – (1) No implied effect. – This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."

Thus, Section 201(a)'s obligations remain operative for the BOCs. Section 201(a) of the Act reads in applicable part:

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers.

The Commission has interpreted Section 201(a) as requiring carriers to provide service to customers, including competitors, for resale upon reasonable request. For example, in 1995, the Commission proposed a $1 million forfeiture against AT&T when it refused to permit two resale carriers to purchase and then resell one of AT&T's contract services.[38] The

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[37] 47 U.S.C. §261(c).

[38] *AT&T Communications*, Notice of Apparent Liability & Order to Show Cause, 10 FCC Rcd 1664 (1995).

Commission has also interpreted Section 201(a) as providing the authority to order Commercial Mobile Radio Service providers to provide equal access to interexchange carriers.[39] On more than one occasion, the Commission ordered, pursuant to Section 201(a) of the Act, the Lincoln Telephone & Telegraph Co. ("LT&T") to furnish business trunk lines to MCI in order to provide its Execunet calling service to Lincoln, Nebraska.[40]

In the case of *AT&T Corp. v. Coeur d'Alene Tribe*,[41] the court reversed a lower court's ruling that AT&T was not obligated to provide toll free service to a lottery that was authorized by a federally recognized Indian Tribe, but was also alleged to be unlawful by several states. The appellate court recognized that AT&T was obligated under Section 201(a) of the Act to provide service upon a customer's reasonable request.

These precedents are not inconsistent with the revisions to the Act adopted by Congress in 1996. Indeed, except in the mind of a BOC, they are fully consistent with the pro-competition theme of the 96 Act. Accordingly, these precedents should and must be followed.[42]

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39 *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408, at ¶31 (1993). *See also, Elkhart Tel. Co. v. Southwestern Bell Tel. Co.*, Memorandum Opinion & Order¸ 11 FCC Rcd 1051 (1995) (holding that Southwestern Bell violated Section 201(a) of the Act when it refused to activate a signaling link to its Signaling System 7 ("SS7") network).

40 *MCI Communications Corp.,* Memorandum Opinion & Order, 68 FCC 2d 1553 (1978); *Lincoln Tel. & Tel.'s Duty to Furnish Interconnection Facilities to MCI Telecommunications Corp.,* Declaratory Ruling, 72 FCC 2d 724, *recon. denied,* FCC 78-884 (1978), *aff'd sub nom. The Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981).

41 *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002).

42 As the FCC is probably painfully aware, the Court of Appeals just recently "slapped" the Commission for dismissing a paging carrier's complaint against Qwest Communications ("Qwest") involving a dispute over the applicability of Qwest's charges to the paging carrier for carrying calls from Qwest's customers to the paging carrier's customers. The paging carrier cited a prior Commission decision as precedent for its position. However, rather than ruling for the paging carrier or reversing its earlier decision in a reasoned opinion, the Commission tried to distinguish

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BellSouth has a legal obligation to provide DSL service to any customer who makes a reasonable request therefor—even when that customer purchases voice services from a CLEC.

III. Preemption

A. The Commission's Preemption of the States in the Triennial Review Order Was Impermissible

The Commission's decision to preempt the states from either adding to the national list of UNEs or from requiring ILECs to offer DSL services to a CLEC's customers is heavy handed and inconsistent with Commission precedent. At the outset, it is clear, however, that the FCC does, under certain circumstances, have the authority to preempt inconsistent state regulation.[43] That authority, however, is not unlimited. The Supreme Court has held that, while state regulation will generally be displaced to the extent that it stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority.[44]

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its prior holding so it could decide in favor of Qwest's position. The court was not impressed with the FCC's creative logic and concluded that the Commission had "simply turned 180 degrees without explanation, and adopted a position at odds with its own regulation." *Mountain Communications*, *slip op.*, at 5.

43 *See e.g., Telerent Leasing Corp.*, Memorandum Opinion & Order, 45 FCC 2d 204 (1974), *aff'd sub nom. North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (holding that the FCC had plenary authority to establish the terms and conditions for interconnecting terminal equipment to the public switched telephone network ("PSTN")).

44 *Louisiana Public Serv. Comm'n v. FCC*, 476 US 355 (1986) (holding that the FCC did not have the power under the Act to preempt a PUC from setting different depreciation rates for carriers for intrastate ratemaking purposes than those depreciation rates set by the FCC even though Section 220 of the Act, 47 U.S.C. §220, specifically grants the FCC power to establish carrier

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There is no evidence whatsoever that a PUC's addition to the UNE list, when supported by a proper and complete "necessary" and "impair" analysis as required by the 1996 amendments to the Act, would create a serious obstacle to the pro-competition purposes of Congress in enacting Section 251(c). So long as the states follow the requirements of the Act, their additions to the national UNE list are likely to result in more and not less competition, which should translate into more consumer choices and lower prices.

One could make an argument, as the BOCs do, that prohibiting PUCs from adding UNEs to the national list or from requiring the BOCs to engage in line sharing could stimulate carrier investments in the network and that such additional network investment is in the public interest. However, Americatel submits that this goal—to the extent valid—is subordinate to Congress' greater goal of more competition and lower consumer prices. Congress intended the promotion of additional network investment to be subordinate to the development of competition by multiple means.

Congress could have, of course, decided that the promotion of facilities-based competition only was the most important goal for the 96 Act. However, in that event, Congress would not have also created indefinite, ongoing obligations for ILECs to offer discounted resale and access to UNEs. Rather, Congress would likely have placed time limits on both resale and UNEs. But it did not do that; Congress, instead, crafted language that ensured that these non-facilities-based methods of competition would remain open indefinitely. Thus, the most the

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depreciation rates. Moreover, the Court decided the Commission could not preempt state law simply because the FCC believed that such action would best effectuate federal policy.).

Commission can argue is that it preempted PUCs in order to promote its policy of encouraging network investments, which is an insufficient ground to trigger the FCC's preemption power, according to the Supreme Court in the *Louisiana PSC* case.

B. Federal-State Comity

Even in those cases where the FCC has had a much stronger case for preemption of the states than it did in the *Triennial Review Order* with respect to the ability of states to add to the national list of UNEs or to require BOCs to sell DSL services to CLEC customers, the FCC has generally refused to preempt state regulation on a blanket basis. The Commission's across-the-board preemption in the *Triennial Review Order* was heavy-handed in nature and inconsistent with federal-state comity and FCC precedent involving preemption.

The FCC normally is sensitive to the need for federal-state comity and, therefore, rarely preempts the states on a blanket basis. Rather, as discussed below, the FCC generally preempts the states on a case-by-case basis and even then, only when there is compelling evidence that preemption is necessary to prevent frustration of a clear federal purpose. Yet, in the *Triennial Review Order*, the Commission simply announced a blanket preemption without regard to individual facts and situations in each local market.

The FCC's inconsistency with its own precedents is glaring. As recently as last summer, the FCC declined a request to preempt state authority over predictive dialers used to make telemarketing calls.[45] According to the FCC's summary of the arguments in favor of

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[45] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report & Order and Notice of Proposed Rulemaking, 29 Comm. Reg. (P&F) 830, at ¶134 (2003) ("*Telemarketing Report & Order*"), *appeal pending sub nom. Mainstream Marketing Services, Inc. v. FCC,* No. 03-9571 (10th Cir.).

preempting state regulation of predictive dialers, some commenting parties argued in support of their position that, "in the absence of a single national policy on predictive dialer use, telemarketers will be subject to the possibility of conflicting state standards."[46] The FCC rejected that argument, holding that states should be able to regulate the use of predictive dialers for intrastate calls even though those regulations might be inconsistent with the FCC's regulations (*i.e.,* more burdensome). The result of the FCC's failure to preempt the states in the area of predictive dialers means that a marketing company in a state with more restrictive rules for predictive dialers must either forgo using a dialing system that could be operated in any other state (because it meets FCC national standards) or the marketing company must use two separate dialing systems for its calls. Yet, despite this compelling evidence that a failure to preempt conflicting state regulation of predictive dialers would create significant burdens on marketing companies, the FCC, out of respect for the needs for federal-state comity, indicated that it would only preempt on a case-by-case basis.

Similarly, the FCC declined to preempt PUCs from imposing different rules for the use of consumer opt-out plans related to carriers' use of Customer Proprietary Network Information ("CPNI") generated from intrastate services than the FCC would apply to carriers' use of opt-out plans for CPNI generated from interstate services.[47] The FCC reasoned as follows:

> While the Commission might still decide that such [state] requirements could be preempted, it would not be appropriate for

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46 *Telemarketing Report & Order, id.*

47 *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report & Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860, at ¶ (2002).

> us to apply an automatic presumption that they will be preempted. We do not take lightly the potential impact that varying state regulations could have on carriers' ability to operate on a multi-state or nationwide basis. Nevertheless, our state counterparts do bring particular expertise to the table regarding competitive conditions and consumer protection issues in their jurisdictions, and privacy regulation, as part of general consumer protection, is not a uniquely federal matter. We decline, therefore, to apply any presumption that we will necessarily preempt more restrictive requirements.[48]

The FCC has refused to preempt the states in numerous other matters as well.[49]

An analysis of Commission precedent leads one to the inescapable conclusion that, under normal circumstances, the FCC would have never preempted the states either from adding UNEs to the national list or from requiring the BOCs to offer DSL service to CLEC customers. However, the *Triennial Review Order* certainly does not reflect normal circumstances.

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48 *Id*., at 71.

49 *Numbering Resource Optimization (Petition for Declaratory Ruling and Request For Expedited Action on the July 15, 1997 Order of the Pennsylvania Public Utility Commission Regarding Area Codes 412, 610, 215, and 717)*, Second Report and Order, Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200, and Second Further Notice of Proposed Rulemaking in CC Docket No. 99-200, 16 FCC Rcd 306 (2000) (declining to prohibit the states from conducting carrier audits of telephone number usage under state law); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Fourth Report & Order, 15 FCC Rcd 13523 (2000), *recon. denied*, 16 FCC Rcd 10009 (2001) (declining to preempt automatically state requirements for mandatory interconnection of switch-based wireless carriers and resale carriers); *Implementation of the Subscriber Carrier Selection Changes Provisions of The Telecommunications Act of 1996* and *Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*¸ Second Report & Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508 (1999) (declining to preempt state regulation of consumer changes in preferred carriers); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of The Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 21233 (1996) (declining to grant a blanket preemption of all state payphone compensation rules); and *The Time Machine, Inc. 800-Access Debit Card Telecommunications Services*, Memorandum Opinion & Order, 11 FCC Rcd 1186(1995) (declining to preempt state regulation of interstate 800-access debit card telecommunications services).

The *Triennial Review Order* makes numerous jerry-built compromises that satisfied no party and constitutes poor public policy that is unlikely to result in lower prices for consumers. The Commission's preemption sword turned its UNE rules into sausage. The FCC, in its *Triennial Review Order*, appears to have attempted to appease the BOCs by preempting the states in the areas of the exclusivity of the national list of UNEs and line-sharing as the BOCs' gain in the "grand compromise"—despite the fact that the FCC has normally exercised its preemption authority only sparingly in recent years.[50] Therefore, it is virtually impossible that a court will sustain the FCC's preemption on these two issues.

IV. In Light of the Likely Remand of the Triennial Review Order, the Commission Should not Grant Relief to BellSouth

Americatel submits that a very strong can be and has been made that the FCC's *Triennial Review Order* is erroneous with respect to its decisions on the issues of prohibiting the states from adding to the national list of UNEs and of mandating that no PUC may require a BOC to provide DSL services to CLEC customers. A number of parties have filed petitions for reconsideration of the *Triennial Review Order*.[51] Several of these petitions raise serious

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50 *Cf. Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, Twelfth Report & Order, Memorandum Opinion & Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, at ¶119 (2000) "[W]e conclude, as a matter of federal-state comity, that the carrier should first consult with the state commission to give the state commission an opportunity to interpret state law. We conclude that state commissions should be allowed a specific opportunity to address and resolve issues involving a state commission's authority under state law to regulate certain carriers or classes of carriers." (footnote omitted).

51 *E.g.,* US Internet Industry Association, Petition for Clarification and Partial Reconsideration; Cellular Telecommunications & Internet Association, Petition for Reconsideration or Clarification; Nextel Communications, Inc., Petition for Reconsideration or Clarification; Earthlink, Inc., Petition for Reconsideration; AT&T Wireless Services, Inc., Petition for Clarification or Reconsideration; SureWest Communications, Petition for Clarification and Partial Reconsideration; and BellSouth Corporation, Petition for Clarification and/or Partial Reconsideration (all filed October 2, 2003).

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challenges to the validity of the *Triennial Review Order*, similar to those discussed herein by Americatel.

It is likely that many of the provisions upon which the *BellSouth Petition* depends are likely to be reconsidered by the Commission and/or vacated by the appellate court, especially in light of the January 28, 2003 argument before the D.C. Circuit.[52] Another remand is likely to occur, and the regulatory policies underlying BellSouth's instant request will be under reevaluation by the FCC. Therefore, to the extent that either the Commission or the court were again to permit the states to add to the national list of UNEs or to require the BOCs to provide DSL services to CLEC customers, BellSouth's petition simply could not be granted.

Section 554(e) of the Administrative Procedure Act ("APA") provides that a federal agency, "in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."[53] The courts have held that the FCC (or any other agency, for that matter) need not issue a declaratory order simply because a party has asked for one.[54] Under these circumstances, the Commission should not grant the relief requested by BellSouth.

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Also, as noted in footnote 5 above, various parties have also sought judicial review of the *Triennial Review Order*.

52 *See* "Appeals Court Signals Possible UNE Order Remand," COMMUNICATIONS DAILY, January 29, 2004, at 1-4.

53 5 U.S.C. §554(e).

54 *Yale B'casting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973).

V. Conclusion

For the reasons set forth above, the Commission should dismiss the *BellSouth Petition*. In the alternative, the FCC should hold the *BellSouth Petition* in abeyance, pending final resolution of the petitions for reconsideration and for judicial review.

Respectfully submitted,
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January 30, 2004

CERTIFICATE OF SERVICE

I, Lila A. Myers, do hereby certify that the foregoing **COMMENTS OF AMERICATEL CORPORATION** was served on this 30th day of January, 2004 upon the upon the following in the manner indicated:

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